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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-6678

RICHARD L. DUGGER,

Petitioner,

v.

LARRY EUGENE MANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-2073

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v.

LARRY EUGENE MANN,

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QUESTION PRESENTED

WHETHER CERTIORARI SHOULD BE GRANTED TO REVIEW AN EN BANC COURT OF APPEALS DECISION WHICH PROPERLY APPLIED THIS COURT'S SETTLED PRECEDENTS IN DETERMINING THAT FEDERAL REVIEW OF THE MERITS OF A HABEAS CORPUS PETITIONER'S CONSTITUTIONAL CLAIM WAS WARRANTED IN A CASE IN WHICH THE STATE SUPREME COURT HAD RULED ON THE MERITS OF THE CLAIM, AND WHETHER CERTIORARI SHOULD BE GRANTED WHERE THE EN BANC COURT OF APPEALS CORRECTLY DETERMINED THAT THE ANALYSIS OF CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), APPLIED TO THE HABEAS APPLICANT'S CLAIM AND THAT RELIEF WAS APPROPRIATE UNDER CALDWELL.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Larry Eugene Mann, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the en banc Eleventh Circuit Court of Appeals in this case. That opinion is reported at 844 F.2d 1446 (11th Cir. 1988).

OPINIONS BELOW

Before the en banc decision in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), a panel of the Eleventh Circuit issued an opinion ordering sentencing relief on the basis of the violations of Caldwell v. Mississippi, 472 U.S. 320 (1985), which occurred in Mr. Mann's case. Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987). The State petitioned for rehearing, and the Court of Appeals vacated the panel opinion and granted rehearing. Mann v. Dugger, 828 F.2d 1498 (11th Cir. 1987). Following the en banc decision of the Eleventh Circuit, this Court granted the State's

motion to stay the Eleventh Circuit's mandate, and the State filed a petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In its petition, the State correctly recited the eighth amendment and section 921.141, Florida Statutes (1981) as controlling. Mr. Mann agrees that the eighth amendment and section 921.141, Florida Statutes (1981) are involved, as is the fourteenth amendment.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This is a habeas corpus action by a Florida death-sentenced inmate. Summary dismissal by the district court was reversed by the Court of Appeals based upon Caldwell v. Mississippi, 472 U.S. 320 (1985), and the matter was remanded with instructions to issue the writ setting aside Mr. Mann's death sentence unless the State provided Mr. Mann with a new sentencing proceeding before a newly empaneled jury. Mann v. Dugger, 844 F.2d 1446, 1458-59 (11th Cir. 1988)(en banc). The State has petitioned this Court for a writ of certiorari, alleging that the Eleventh Circuit erroneously determined that Mr. Mann's Caldwell claim was not procedurally barred and that the Eleventh Circuit erroneously found Mr. Mann's Caldwell claim to be meritorious.

Mr. Mann's capital trial and sentencing proceedings occurred in 1981. During the penalty phase of trial, counsel for Mr. Mann requested that Mr. Mann's capital jury be instructed that the trial judge was required to give their penalty recommendation great weight in determining an appropriate sentence (R. 2357). The requested instruction was denied (Id.). The trial prosecutor thereafter made innumerable misleading, inaccurate, and false comments to Mr. Mann's sentencing jury, comments whose apparent purpose was to and which did in fact serve to diminish the jurors' sense of responsibility for the sentencing task that

Florida law would call on them to perform. The trial judge, through his own comments and instructions, not only failed to correct the prosecutor's persistent improper and inaccurate statements, but approved them and took them a step further, thus enhancing the harm. The prosecutor's and trial judge's statements were discussed at length in Mr. Mann's en banc Eleventh Circuit initial and reply briefs (Respondent's Supplemental Appendix, 1 and 3); excerpts from the record reflecting the statements, comments, and instructions herein at issue were appended to Mr. Mann's initial en banc brief and are reproduced in the supplemental appendix filed with this brief in opposition (Respondent's Supplemental Appendix, 2).[1] Those matters will not be detailed again herein. In this regard, Mr. Mann respectfully refers the Court to his supplemental appendix.

On direct appeal, the Florida Supreme Court affirmed Mr. Mann's conviction, but vacated the death sentence and remanded the matter to the trial court for resentencing. Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). At resentencing, counsel for Mr. Mann requested that a new sentencing jury be empaneled (R. 3-4), because Florida law required the trial judge to give great weight to the jury recommendation and the prior jury recommendation was tainted by consideration of an aggravating circumstance invalidated by the Florida Supreme Court (R. 34-36). That motion was denied (R. 7, 36), and Mr. Mann was resentenced to death by the judge (R. 14-15).

On direct appeal from resentencing, the Florida Supreme Court affirmed the death sentence, without addressing Mr. Mann's claim that a new jury should have been empaneled for resentencing. Mann v. State, 453 So. 2d 784 (Fla. 1984).

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[1]For the Court's convenience the en banc Eleventh Circuit briefs and the record excerpts attached to Mr. Mann's initial en banc brief are being filed with this Court and are included in the supplemental appendix to this brief in opposition.

After the issuance of this Court's 1985 Caldwell v. Mississippi decision, in January of 1986, Mr. Mann filed a Motion to Vacate Judgments and Sentences pursuant to Fla. R. Crim. P. 3.850, in which he claimed, inter alia, that his sentence of death was obtained in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This issue was raised as ineffective assistance of counsel, as prosecutorial misconduct, and as an independent claim (See Motion to Vacate, Claims IV, VI, and VII). At the same time, Mr. Mann also filed an Original Petition for Writ of Habeas Corpus in the Florida Supreme Court, raising the Caldwell claim as both fundamental error and ineffective assistance of appellate counsel (See Petition for Writ of Habeas Corpus, Claims I and IX). The State did not file a response to either the Motion to Vacate or the Petition for Writ of Habeas Corpus.

Neither the trial court nor the Florida Supreme Court held oral argument on the motion or petition. See Mann v. State, 482 So. 2d 1360, 1361 and n.* (Fla. 1986). After the trial court's summary denial, in a single opinion involving both the appeal from the denial of the Motion to Vacate and the Petition for Writ of Habeas Corpus, the Florida Supreme Court found Mr. Mann's post-conviction claims, including the Caldwell claim, to be without merit:

> . . . A comparison of the original trial record clearly and conclusively refutes any claim that there was any constitutional infirmity in the trial. The same is true of the appellate process. Although Mann urges vehemently numerous grounds for habeas corpus relief, each is either refuted or is insufficient for relief.
>
> In conclusion, we are satisfied that this was a well and conscientiously tried case by counsel, the trial judge, and the jury. Appellate counsel and this Court have zealously fulfilled their review responsibilities.

Mann v. State, 482 So. 2d 1360, 1362 (Fla. 1986). The Court then denied Rule 3.850 and habeas corpus relief, and stated that no petition for rehearing would be entertained. Id.

Following the Florida Supreme Court's denial of relief, Mr. Mann filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. That court denied all relief, and Mr. Mann appealed to the United States Court of Appeals for the Eleventh Circuit. A panel of the Eleventh Circuit affirmed the District Court's denial of relief as to the conviction, but held that Mr. Mann was entitled to resentencing under Caldwell. Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987). In reaching the merits of Mr. Mann's Caldwell claim the panel opinion noted that the Florida Supreme Court had ruled on the merits of Mr. Mann's claim. Id. at 1481.

The Eleventh Circuit granted the State's petition for rehearing, vacated the panel opinion, and set the case for rehearing en banc. Mann v. Dugger, 828 F.2d 1498 (11th Cir. 1987). The en banc Eleventh Circuit found that Mr. Mann's Caldwell claim was not procedurally defaulted because the Florida Supreme Court had disposed of it on the merits, Mann v. Dugger, 844 F.2d 1446, 1448 n.4 (11th Cir. 1988), and held that Mr. Mann was entitled to resentencing under Caldwell. Id., 844 F.2d at 1448. The State has petitioned this Court for a writ of certiorari to review the judgment of the Eleventh Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THE DECISION BELOW CORRECTLY APPLIED THIS COURT'S PRECEDENTS AND WAS IN ACCORD WITH ALL OTHER CIRCUIT COURTS OF APPEAL IN DETERMINING THAT MR. MANN'S CALDWELL CLAIM WAS NOT PROCEDURALLY BARRED

The bulk of the State's Petition for Writ of Certiorari asserts that the Eleventh Circuit erroneously determined that Mr. Mann's Caldwell claim was not procedurally barred. Thus, the State argues, this Court should review the Eleventh Circuit's judgment in order to (1) "preserve" the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977), and (2) reconcile a purported conflict between the Circuit Courts of Appeal regarding "what constitutes

a discussion of the merits of a constitutional claim in a state appellate opinion so as to allow federal courts to entertain a procedurally defaulted issue." (Petition for Writ of Certiorari, p. 16). The State contends that this Court's pending review in Dugger v. Adams, 108 S. Ct. 1106 (1988), and Harris v. Reed, 108 S. Ct. 1107 (1988), support a grant of certiorari review in Mr. Mann's case. For the reasons discussed below, Mr. Mann respectfully submits that Adams and Harris are inapposite to the en banc Eleventh Circuit's decision in Mann, and that therefore this Court should deny the State's petition.

Adams and Harris involve the disposition of procedural questions which are simply not involved in Mr. Mann's case. In Adams, this Court has been asked to determine whether the federal habeas corpus abuse of the writ doctrine precluded consideration of the merits of Mr. Adams' claim under Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), and whether the state Supreme Court's reliance on a procedural bar also precluded federal review of the Caldwell claim. In Harris, this Court has been asked to determine whether federal habeas corpus review of a claim is proper when the state court addresses both procedural default and the merits of a claim in denying relief. Harris v. Reed, 108 S. Ct. 1107 (1988).

None of these questions was or is at issue in Mr. Mann's case. To the contrary, Mr. Mann's case involves the straightforward federal review of a constitutional claim which was decided on the merits in the state courts. The claim was presented in Mr. Mann's first and only federal habeas corpus petition, and therefore abuse of the writ is clearly not involved. Moreover, the Florida Supreme Court reviewed Mr. Mann's claim on its merits, without mentioning a procedural bar, Mann v. State, 482 So. 2d 1360, 1361-62 (Fla. 1986), and the en banc Eleventh Circuit therefore found federal habeas corpus merits review proper:

> We find that the claim is not procedurally barred. Although petitioner failed to raise the claim on direct appeal, he did raise it in his Rule 3.850 motion. The circuit court denied that motion and petitioner appealed to the Supreme Court of Florida. In disposing of the appeal, the supreme court stated that its review of the record "clearly and conclusively refute[d] any claim that there was any constitutional infirmity in the trial." Mann v. State 482 So. 2d 1360, 1362 (Fla. 1986) (emphasis added). We interpret this statement as indicating that the supreme court considered the merits of each claim in petitioner's Rule 3.850 motion, including the Caldwell claim. Since the Supreme Court of Florida therefore chose not to enforce its own procedural default rule, federal habeas review of the claim is not barred.

Mann v. Dugger, 844 F.2d at 1448 n.4. It is in this context that the Petitioner's bald assertions should be considered.

1. The circumstances surrounding Mr. Mann's presentation of the Caldwell claim to the state courts

The Florida Supreme Court ruled only on the merits of Mr. Mann's Caldwell claim, without even mentioning a procedural bar. Mr. Mann had presented the merits of his Caldwell claim to the Florida state courts in his Motion to Vacate (Fla. R. Crim. P. 3.850) as well as in his state habeas corpus petition before the Florida Supreme Court.

The State did not file a response to either the Motion to Vacate or the state habeas corpus petition. Neither the trial court nor the Florida Supreme Court held oral argument on the motion or the petition. In its combined ruling on the appeal from the denial of the Motion to Vacate and the state habeas petition, the Florida Supreme Court denied relief on the merits of various claims presented by Mr. Mann, including the Caldwell claim, writing:

> It is obvious and clear that present counsel's complaint of trial counsel's handling of the trial would not have affected the truth-seeking process, the evaluation of the evidence, the proper application of the law, or the outcome of the case. A comparison of the original trial record clearly and conclusively refutes any claim that there was any constitutional infirmity

> in the trial. The same is true of the appellate process. Although Mann urges vehemently numerous grounds for habeas corpus relief, each is either refuted or is insufficient for relief.
>
> In conclusion, we are satisfied that this was a well and conscientiously tried case by counsel, the trial judge, and the jury. Appellate counsel and this Court have zealously fulfilled their review responsibilities.

Mann v. State, 482 So. 2d 1360, 1361-62 (Fla. 1986)(emphasis added).

2. The Eleventh Circuit correctly determined that the Florida Supreme Court ruled on the merits of Mr. Mann's Caldwell claim and thus properly recognized that a Sykes "cause" and "prejudice" analysis was unnecessary in Mr. Mann's case

Under Wainwright v. Sykes, 433 U.S. 72 (1977), federal habeas corpus review is not available when a state prisoner's constitutional claim has been procedurally barred by the state courts unless the petitioner can demonstrate cause for and prejudice resulting from the procedural bar. Sykes, 433 U.S. at 87. As Sykes itself explains, however, its rule applies only to "contentions of federal law which were not resolved on the merits in the state proceeding . . ." Id. at 87 (emphasis in original).

The Wainwright v. Sykes procedural default analysis is based on the understanding that "considerations of comity" require that federal courts give appropriate respect to an "adequate and independent state ground" on which a state court has relied to reject a federal claim. 433 U.S. 72, 78-79, 84 (1977), quoting Francis v. Henderson, 425 U.S. 536, 538-39 (1976). However, when the state court does not "indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979). See also Wainwright v. Greenfield, 106 S. Ct. 634, 637 n.3 (1986)(noting, in habeas corpus case, that because the state appellate court addressed the issue on the merits, the State's

procedural bar arguments would be rejected); Engle v. Isaac, 456 U.S. 107, 135 n.44 (1982)(federal review appropriate when state courts exercise, the right to waive state procedural rule).

A similar analysis is applied when this Court is asked to review state court opinions by petition for writ of certiorari. See, e.g., Mills v. Maryland, 108 S. Ct. 1860, 1863 n.3 (1988)(federal jurisdiction over federal constitutional question established when state appellate court opinion speaks to merits review); see also Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985); James v. Kentucky, 466 U.S. 341, 348-49 (1984); Johnson v. Mississippi, 56 U.S.L.W. 4561, 4563 (June 13, 1988). As the Court explained in Caldwell itself:

> The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. See Ulster County Court v. Allen, 442 U.S. 140, 152-154, 99 S. Ct. 2213, 2222-2223, 60 L.Ed.2d 777 (1979). Moreover, we will not assume that a state-court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Michigan v. Long, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Id., at 1041, 103 S. Ct., at 3476.
>
> An examination of the decision below reveals that it contains no clear or express indication that "separate, adequate, and independent" state-law grounds were the basis for the court's judgment.

Caldwell v. Mississippi, 472 U.S. at 327 (emphasis added).

Under this Court's settled precedents, see, e.g., County Court of Ulster County v. Allen, supra; Wainwright v. Greenfeld, supra, it is now well-established that before reaching the Sykes

cause and prejudice analysis, a federal habeas court must determine whether the state appellate court invoked a procedural bar or whether the state court opinion spoke only to merits review. In making this determination, a federal habeas court should look to the law of the state and the history of the litigation. Allen, 442 U.S. at 149. Factors to examine include whether the State argued a procedural bar to the state courts and whether the state court opinion relied upon procedural default or the court's view of the merits of the claim. Allen, 442 U.S. at 152-53; see also Wainwright v. Greenfield, supra, 106 S. Ct. at 637 n.3. This Court's precedents also make clear that of greatest significance is whether the state appellate opinion contains a "plain statement" indicating "clearly and expressly" that the state court relied on an adequate and independent state procedural ground barring federal review. Michigan v. Long, 463 U.S. 1032, 1041 (1983). The state court must "actually have relied on the procedural bar as an independent basis for its disposition of the case" in order to foreclose federal review. Caldwell v. Mississippi, 472 U.S. at 327, citing Ulster County Court v. Allen and Michigan v. Long. Absolutely no such "plain statement" or express and clear reliance on a state procedural rule is reflected in the Florida Supreme Court's Mann opinion. See 482 So. 2d at 1361-62. Moreover, as discussed below, the Petitioner never argued procedural default before the state courts, the history of the litigation of Mr. Mann's case reveals that the state appellate court disposed of Mr. Mann's claim on the merits, and the history of the Florida Supreme Court's treatment of post-conviction litigants' Caldwell claims -- both before and after Mr. Mann's state court pleadings were disposed of -- reveals that the procedural bar which the Petitioner now asserts before this Court is neither "firmly established," nor "regularly" and "strictly" enforced or followed. See James v. Kentucky, 466 U.S. 341, 348-49 (1984); Johnson v. Mississippi, 56

U.S.L.W. 4561, 4563 (June 13, 1988); Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985).

The Eleventh Circuit applies the Allen analysis when determining whether a state court has ruled on the merits of a claim, and did so in Mr. Mann's case. Regarding the State's contention that Mr. Mann's Caldwell claim was barred by procedural default, the Eleventh Circuit explained:

> We find that the claim is not procedurally barred. Although petitioner failed to raise the claim on direct appeal, he did raise it in his Rule 3.850 motion. The circuit court denied that motion and petitioner appealed to the Supreme Court of Florida. In disposing of the appeal, the supreme court stated that its review of the record "clearly and conclusively refute[d] any claim that there was any constitutional infirmity in the trial." Mann v. State, 482 So. 2d 1360, 1362 (Fla. 1986) (emphasis added). We interpret this statement as indicating that the supreme court considered the merits of each claim in petitioner's Rule 3.850 motion, including the Caldwell claim. Since the Supreme Court of Florida therefore chose not to enforce its own procedural default rule, federal habeas review of the claim is not barred. See Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1380, 94 L.Ed.2d 694 (1987); Campbell v. Wainwright, 738 F.2d 1573, 1576-77 (11th Cir. 1984), cert. denied, 475 U.S. 1126, 106 S. Ct. 1652, 90 L.Ed.2d 195 (1986); Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1982), cert. denied, 459 U.S. 1110, 103 S. Ct. 740, 74 L.Ed.2d 961 (1983).

Mann v. Dugger, 844 F.2d 1446, 1448 n.4 (11th Cir. 1988)(en banc).

In finding that Mr. Mann's Caldwell claim was not barred by procedural default, the Eleventh Circuit relied upon and properly followed this Court's settled precedents. The authorities recited in the Eleventh Circuit's opinion follow the Sykes rule that the cause and prejudice test applies only to claims which are barred by the state courts' application of an adequate and independent state procedural rule; those authorities follow the Long requirement that the state court opinion must contain a "plain statement" that the state court relied upon an adequate and independent state ground barring federal review; and, those

authorities also follow the Allen rule that federal review is proper when a federal constitutional claim has been disposed of on the merits by the state appellate court.

Thus, in Oliver v. Wainwright, 795 F.2d 1524 (11th Cir. 1986), the court found it unnecessary to decide whether the Sykes cause and prejudice standard applied to the petitioner's claim because the federal court's analysis demonstrated that the state court had ruled on the merits of the claim. Id. at 1528-29. The court determined that the state court opinion provided no indication that the state court relied upon a procedural bar; thus Allen permitted the federal court to review the claim on the merits. Oliver, supra, at 1528-29. Similarly, in Campbell v. Wainwright, 738 F.2d 1573 (11th Cir. 1984), the court found that a state court ruling which stated that some claims were procedurally barred while others were without merit permitted federal habeas review of the claims because the ruling did not expressly state which claims were barred and which were not. Id. at 1577. Finally, Rogers v. McMullen, 673 F.2d 1185 (11th Cir. 1982), followed Sykes in holding that where the state supreme court reached the merits of a constitutional claim, Sykes did not foreclose federal habeas review. Id., 675 F.2d at 1188.

Contrary to the Petitioner's assertions, this is not a case where the Florida Supreme Court summarily denied relief without an opinion, where that court spoke in the alternative, or even where the court's holding was ambiguous.[2] In fact, the Florida

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[2]In this latter situation, of course, federal review would not be barred, given the Florida Supreme Court's history of excusing its procedural rules and reaching the merits of post-conviction capital litigants' claims in a number of cases. See Amicus curiae brief of National Legal Aid and Defenders Association, Dugger v. Adams, No. 87-121 (summarizing Florida Supreme Court opinions). If the Florida Supreme Court opinion were to be characterized as "ambiguous" -- an unlikely proposition given the opinion's lack of any express reliance on a state procedural rule and the fact that the state appellate

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Supreme Court's opinion could not be more "plain": the court said that the record "refutes any [Rule 3.850] claim that there was any constitutional infirmity" in the trial; the court said that each claim in the state habeas petition "is either refuted or is insufficient for relief." Mann, 482 So. 2d at 1362 (emphasis supplied).[3] Mr. Mann's Caldwell claim was presented in his Rule 3.850 motion and in his state court habeas corpus action. With regard to each pleading, the Florida Supreme Court denied the claim on the merits. Thus, the cases recited by the State in support of its contention that the Eleventh Circuit wrongly interpreted a "silent" or "ambiguous" state court opinion are absolutely inapplicable to this case. The Florida Supreme Court was not silent or ambiguous, but unmistakably clear -- it believed Mr. Mann's Caldwell claims to be without merit.

Further, even under the analyses employed by other Circuit Courts of Appeal -- with which the State argues the Eleventh Circuit is in conflict -- the Florida Supreme Court's opinion would be determined to be a merits ruling. For example, the State contends that the Second Circuit "interprets a silent state opinion as a decision resting on procedural grounds . . . while treating ambiguous language in a state opinion as a ruling on the merits. . . ." (Petition for Writ of Certiorari, p. 17). Setting aside for the moment the fact that the Florida Supreme Court opinion in Mann was neither silent nor ambiguous, the State's

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court's opinion spoke only to a rejection of the merits of Mr. Mann's claims -- the very ambiguity would defeat any adequacy and independence which could be ascribed to the Petitioner's asserted procedural rule. See Oliver, supra; Campbell, supra; County Court of Ulster County v. Allen, supra. This is especially so given the Florida Supreme Court's history of inconsistently applying its procedural rules in post-conviction cases such as Mr. Mann's. See section A(3), infra.

[3]The Florida Supreme Court's opinion in Mr. Mann's case does not even come close to the Michigan appellate court's opinion found insufficient to foreclose federal review in Long.

description of the Second Circuit's analysis is too facile.[4] When faced with a "silent" state court affirmance, the Second Circuit looks to other factors to determine whether the state court invoked a procedural bar or ruled on the merits of the case: its determination depends upon how the State responded to claims which might be subject to a procedural bar. Martinez v. Harris, 675 F.2d 51, 54 (2d Cir. 1982). The State may argue that the claim is subject to procedural default; the State may only address the merits of the claim; or the State may argue in the alternative. Id. If the State calls the procedural bar to the attention of the state court, the Second Circuit interprets a "silent" affirmance as resting on procedural grounds. Id.; see also Stepney v. Lopes, 760 F.2d 40, 44 (2d Cir. 1985). However, this analysis does not apply where the state appellate court issues a written opinion. In that case, "the grounds stated in the written opinion control a federal court's inquiry." Rosenfeld v. Dunham, 820 F.2d 52, 54 (2d Cir. 1987). In the Second Circuit, Mr. Mann's Caldwell claim would be determined on the merits: The State filed no responsive pleadings in the state courts and no oral arguments were held. Even if the Florida

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[4]When the Second Circuit refers to "silent" affirmances it is discussing cases in which the state appellate court does not write an opinion, but rather affirms a conviction in a one-word or one-line summary order. Counsel's research has disclosed no case in which the Second Circuit has applied its "silent" affirmance rule where, as in Mann, the state appellate court issues a written opinion. The Second Circuit would not apply its "silent" affirmance rule to Mr. Mann's case, but would review the case in accordance with the Eleventh Circuit's analysis. See Rosenfeld v. Dunham, 820 F.2d 52, 54 (2d Cir. 1987). The Eleventh Circuit has, in fact, adopted the Second Circuit's analysis with regard to "silent" (one-word/one-line summary affirmance) state appellate court affirmances. See Campbell v. Wainwright, 738 F.2d at 1578 (adopting Second Circuit's Martinez v. Harris, 675 F.2d 51 (2d Cir. 1982), analysis). Of course, Mr. Mann's case does not involve a one-word/one-line summary affirmance, but rather involves a formal state appellate court opinion. The Second and Eleventh Circuits' "silent" affirmance rule is therefore inapplicable to Mr. Mann's case. Rather, the appropriate analysis is that of Allen, Long, Caldwell, and Greenfield. That is the analysis that the Eleventh Circuit applied.

Supreme Court had issued a "silent" affirmance in Mr. Mann's case, that Court had no grounds before it except the merits of Mr. Mann's claims. But the Florida Supreme Court was not "silent", and its written opinion clearly discusses only the merits of Mr. Mann's Motion to Vacate and state habeas petition, applying no procedural bar to Mr. Mann's Caldwell claim.

Similarly, the Fifth Circuit looks to the history of the case to determine whether a state court was aware of a procedural default when the state court issues a "silent" affirmance and looks to the opinion itself when the state court writes. Preston v. Maggio, 705 F.2d 113, 116 (5th Cir. 1983); see also Thompson v. Lynaugh, 821 F.2d 1080, 1082 (5th Cir. 1987). The same is true in the Sixth Circuit, Shepard v. Foltz, 771 F.2d 962, 965 (6th Cir. 1985); Raper v. Mintzes, 706 F.2d 161, 164 (6th Cir. 1983), and in the Eighth Circuit, Ruell v. Wyrick, 675 F.2d 1007, 1008-09 (8th Cir. 1982). In fact, all of the Circuits are consistent in this regard. Under the analysis of any circuit, Mr. Mann's Caldwell claim would be deemed to have been determined on the merits by the state appellate court.

In accord with this Court's precedents and with the analyses employed in the other Circuit Courts of Appeal, the Eleventh Circuit correctly determined that the Florida Supreme Court ruled on the merits of Mr. Mann's Caldwell claim and thus that federal habeas review was proper. The Eleventh Circuit examined the Florida Supreme Court's Mann opinion and correctly found that it discussed only merits, without mentioning a procedural bar.[5] The

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[5]In Maynard v. Cartwright, 108 S. Ct. 1853 (1988), this Court recently noted, "We normally defer to Courts of Appeals in their interpretation of state law. . . ." Id. at 1857. Mr. Mann respectfully notes that the en banc Eleventh Circuit reviews all federal habeas actions arising from Florida convictions, and has among its ranks federal jurists from the state of Florida (including former Florida state court judges); that Court is therefore intimately familiar with the practice of Florida's courts and especially with the practice of the Florida Supreme

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Eleventh Circuit's ruling does not denigrate the doctrine of Sykes, with which it is clearly in accord, and does not conflict with the analysis employed by any other circuit.

3. The Florida Supreme Court has not consistently applied a procedural bar to Caldwell claims in collateral proceedings

In order to preclude a federal court from reviewing a state prisoner's constitutional claim, any state procedural bar invoked by the state court must be "adequate" and "independent". County Court of Ulster County v. Allen, 442 U.S. 140, 147 (1979). Thus, only a "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights." James v. Kentucky, 466 U.S. 341, 348-49 (1984)(citation omitted); see also Barr v. City of Columbia, 378 U.S. 146, 149 (1964)("We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right of review"); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly"). As this Court has again recently explained: "[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" Johnson v. Mississippi, 56 U.S.L.W. 4561, 4563 (June 13, 1988)(citations omitted). Caldwell itself makes the same point. Id, 472 U.S. at 327-28 (Mere existence of state procedural rule is insufficient to preclude federal review; rule must be strictly and regularly followed and must be actually

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(footnote continued from previous page)

Court. The Eleventh Circuit is thus in a much better position to discern the largely factually-based question of whether the state Supreme Court intended to reach the merits of a federal constitutional claim or apply a procedural bar. Maynard v. Cartwright, supra; see also Butner v. United States, 440 U.S. 48, 58 (1979)("[F]ederal judges who regularly deal with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.")

relied upon "as an independent basis for [the state appellate court's] disposition of the case"), citing Ulster County Court v. Allen and Michigan v. Long.

The State's petition broadly asserts that "the Florida Supreme Court has, without exception, held that either the failure to object at the trial level or the failure to raise the matter on direct appeal results in a procedural default of [a] Caldwell claim." (Petition for Writ of Certiorari, p. 8)(emphasis supplied). This statement is a gross oversimplification, to say the least, of the status of Caldwell claims in Florida collateral proceedings.

This Court issued its Caldwell opinion on June 11, 1985. Caldwell, 105 S. Ct. 2633 (1985). Three months later, the Florida Supreme Court ruled on the merits of a Caldwell claim raised in a successive motion for post-conviction relief. Darden v. State, 475 So. 2d 217, 221 (Fla. 1985).[6] In February, 1986, the Florida Supreme Court denied Mr. Mann's Motion to Vacate and state habeas Caldwell claims on the merits. Mann, 482 So. 2d at 1361-62. Since that time, the Florida Supreme Court has been far from consistent in addressing Caldwell claims raised in collateral proceedings.

The Florida Supreme Court has several times indicated that Caldwell claims would be entertained in initial collateral proceedings, but are not available in successive motions or petitions. For example, in Card v. Dugger, 512 So. 2d 829 (Fla. 1987), in response to a Caldwell claim raised in a successive state habeas corpus petition, the court held:

> Card filed his first petition for habeas corpus on June 2, 1986, and Caldwell was decided by the United States Supreme Court in 1985. . . . [A] second petition filed after

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[6]This Court thereafter also ruled on the merits of that post-conviction litigant's Caldwell claim. See Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.15 (1986).

> Caldwell which raises this issue for the first time constitutes an abuse of the writ.

Id. at 831. Similarly, in Delap v. State, 513 So. 2d 1050 (Fla. 1987), in response to a Caldwell claim raised in a successive motion for post-conviction relief, the court held:

> Delap's third claim, predicated upon Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), should have been raised, if at all, in Delap's first motion for postconviction relief which was filed more than six months after the United States Supreme Court's opinion in Caldwell.

Id. at 1051.

In Combs v. State, 525 So. 2d 853 (Fla. 1988), decided in February of this year -- a case involving the presentation of a Caldwell claim in a capital litigant's initial state court post-conviction action -- the Florida Supreme Court ruled on the merits of the Caldwell claim and analyzed the issue at length in an effort to demonstrate that the issue in Mr. Combs' case was without merit. Combs, 525 So. 2d at 855-58. Cf. id. at 861 (Barkett, J., specially concurring)("Mann was based not on some fault inherent in the instructions themselves, but on the prosecutor's misleading remarks and the judge's failure to correct them.")

Most recently, in Darden v. Dugger, 521 So. 2d 1103 (Fla. 1988)(Darden II), in response to a Caldwell claim raised in a successive state habeas corpus petition, the court held:

> Darden's second claim, that the jury was mislead as to its sentencing role in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), was previously rejected by this Court in Darden v. State, 475 So. 2d at 221. . . . Darden takes the position that because "this very issue is now pending before the United States Supreme Court in Adams v. Dugger, No. 87-121" . . . this Court should issue a stay of execution and preserve its jurisdiction to address this claim after the issuance of Adams. If this were the first time Darden presented this Caldwell claim to this Court, such a stay may be warranted. However, because this claim was previously reject[ed] by this court, we

> decline to issue a stay to reconsider the issue.

Id. at 1104-05 (footnotes and citations omitted).

As is apparent from the Florida Supreme Court's holdings regarding the availability of collateral proceedings for raising Caldwell claims, had any procedural bar been applied to Mr. Mann's Caldwell claim, such a bar could not be deemed adequate and independent. Prior to Mr. Mann's state collateral proceedings, the Florida Supreme Court reviewed a Caldwell claim on the merits, Darden, supra, and since Mr. Mann's state proceedings, the Florida Supreme Court has been inconsistent in applying a procedural bar to Caldwell claims. Combs; Card; Delap; Darden II, supra. Under Florida's law, see Allen, 442 U.S. at 149, claims such as Mr. Mann's are not clearly subject to a procedural bar. See Adams v. Dugger, 816 F.2d 1493, 1497 (11th Cir. 1987)("Adams' Caldwell claim is the very type of claim for which Florida created the Rule 3.850 procedure.") Under the Florida Supreme Court's practice, discussed above, there exists no "firmly established and regularly followed state practice . . . prevent[ing]" federal review, see James, 466 U.S. at 348-49, with regard to Caldwell claims such as Mr. Mann's, nor does the Florida Supreme Court "strictly and regularly" apply a procedural bar to such issues. Johnson, supra, 56 U.S.L.W. at 4563. Prior to Mr. Mann's state court collateral proceedings, Darden, supra, and after Mr. Mann's state court collateral proceedings, Combs, supra, the Florida Supreme Court has reviewed the merits of post-conviction litigants' Caldwell claims. Of course, the Florida Supreme Court reviewed the merits in Mr. Mann's case, see sections A(1) and (2), supra, a ruling in conformity with its practice in other cases.

4. Neither Adams nor Harris will control the disposition of Mr. Mann's Caldwell claim.

Both cases relied upon in the Petition for Writ of Certiorari involve the disposition of procedural questions which

are not at issue in Mr. Mann's case. In Dugger v. Adams, 108 S. Ct. 1106 (1988), this Court has been asked to determine whether the federal habeas corpus abuse of the writ doctrine precluded consideration of the merits of Mr. Adams' Caldwell claim, and whether the state Supreme Court's reliance on a procedural bar also precluded federal review of the Caldwell claim. Neither of these questions was or is at issue here. Rather, Mr. Mann's case involves the straightforward federal review of a constitutional claim which was decided on the merits in the state courts. As stated in the introduction to this section, Mr. Mann's claim was presented in his first and only federal habeas corpus petition; abuse of the writ is therefore clearly not involved. Further, in Adams, the Florida Supreme Court clearly and unequivocally found Mr. Adams' claim an abuse of the post-conviction process and barred by procedural default. Adams v. State, 484 So. 2d 1216, 1217 (Fla. 1986). The Florida Supreme Court, on the other hand, reviewed Mr. Mann's claim on the merits, without even mentioning a procedural bar. Mann, 482 So. 2d at 1361-62. Thus, the Eleventh Circuit correctly considered the federal constitutional questions involved in Mr. Mann's claim, and the disposition of the abuse and default questions presented to this Court in Adams will not affect correctness of that decision.

In Harris v. Reed, 108 S. Ct. 1107 (1988), this Court has been asked to determine whether federal habeas corpus review of a claim is proper when the state court applies a procedural bar and discusses the merits of a claim in denying relief. The lower court in Harris described the state court opinion as follows:

> In examining Harris' post-conviction petition, the state court noted that failure to present an issue on direct appeal precludes post-conviction review unless the nature of the issue is such that it could not have been raised on direct appeal. The district court then examined the trial court record and found that all grounds, save that relating to the alibi witnesses, could have been presented on direct appeal. Without

> expressly finding that all other grounds were waived, the court then proceeded to a short discussion of general standards for judging a claim of ineffective counsel. Next, the court analyzed both trial counsel's failure to call alibi witnesses, as well as other grounds that could have been raised on direct appeal and concluded that Harris had received the effective assistance of his trial counsel.

Harris v. Reed, 822 F.2d 684, 687 (7th Cir. 1987).[7] The Seventh Circuit distinguished this state court opinion from those which "completely ignored waiver" and those which "expressly relied, in part, on waiver," id., concluding that, although the state court opinion was "ambiguous", the state court intended to find all but one claim waived and only alternatively rejected the claims on the merits. Id. Federal habeas review was therefore precluded. Id. As is apparent from the discussion in the preceding section, this is not the situation in Mr. Mann's case, where the Florida Supreme Court spoke only in terms of merits review and denied Mr. Mann's claim on the basis of such review. The Florida Supreme Court neither expressly relied on any procedural bar nor made alternative rulings with regard to Mr. Mann's Caldwell claim. Its opinion was unambiguous: relief was denied on the merits. Accordingly, the Eleventh Circuit properly exercised its authority to review the federal questions involved in Mr. Mann's claim, and the disposition of Harris before this Court will not affect the propriety of that decision.

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[7]It is noteworthy that nowhere in its Mann opinion, 482 So. 2d at 1361-62, does the Florida Supreme Court state that it would decline to consider Mr. Mann's Caldwell claims, on the basis of standard procedural grounds such as the failure to urge the issue on direct appeal. The Florida Supreme Court's opinion speaks only to merits review. As discussed throughout this brief in opposition, the central question which the Eleventh Circuit properly resolved is not whether a state procedural ground existed, but whether the state appellate court itself expressly indicated that the federal claim would be rejected because of a state court procedural default. Allen, supra; Caldwell, supra. After all, "[t]he federal court's task is not to apply state procedural rules as though it stood in the state court's shoes," Euell v. Wyrick, 675 F.2d 1007, 1008 (8th Cir. 1982), but to determine if federal review would be appropriate. Allen; Caldwell; Engle v. Isaac; Wainwright v. Greenfield.

B. THE DECISION BELOW CORRECTLY DETERMINED THAT CALDWELL V. MISSISSIPPI APPLIES TO THE FLORIDA CAPITAL SENTENCING SCHEME

The Petition for Writ of Certiorari also urges this Court to grant certiorari review in order to correct what the Petitioner perceives as an "express and irreconcilable conflict" between the Eleventh Circuit's analysis of the application of Caldwell to the Florida capital sentencing scheme and the Florida Supreme Court's analysis. Significantly, the State does not argue that a Florida capital jury is not an integral part of the Florida capital sentencing scheme, but simply asserts broadly that the Eleventh Circuit's holding in Mann is "in irreconcilable conflict with every decision of the Florida Supreme Court on this point." (Petition for Writ of Certiorari, p. 8)(emphasis supplied). The State is wrong to assert that Caldwell does not apply to the Florida capital sentencing scheme and is wrong to assert that "every decision" of the Florida Supreme Court has so held; the Florida Supreme Court's own opinions make undeniably plain.

Initially, Mr. Mann notes, as did the Eleventh Circuit, that the federal courts, not state courts, are the arbiters of claims grounded on the federal constitution. Thus, although the Florida Supreme Court has thus far refused to grant relief on a Caldwell claim, the Eleventh Circuit is not required to follow the Florida Supreme Court's interpretation of the federal constitution:

> To date, the Supreme Court of Florida has refused to grant relief on Caldwell claims. . . . We do not read these cases as necessarily holding that a Caldwell violation could never occur in a Florida case. . . . In any event, we are not bound by a state court's application of federal constitutional principles. We look to that court's pronouncements only to determine the nature of the sentencing process; we independently decide how the federal Constitution applies to claims pertaining to that process as thus defined.

Mann, 844 F.2d at 1455 n.10. Cf. Sandstrom v. Montana, 442 U.S. 510, 516-17 (1979)("The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption

under Montana law, but it is not the final authority on the interpretation which a jury could have given the instruction."). See also Caldwell, supra, 472 U.S. at 326 (relief granted pursuant to eighth and fourteenth amendments notwithstanding state Supreme Court opinion which "flatly rejected the contention that the prosecutor's comments could constitute a violation of the Eighth Amendment . . .").

After examining the Florida Supreme Court's pronouncements to determine the nature of Florida's capital sentencing process,[8] cf. Sandstrom, supra, 442 U.S. at 516-17, the en banc decision of the Eleventh Circuit in Mann carefully set out why Caldwell is applicable in Florida, despite the fact that Florida juries are not the "final" sentencers as they are in Mississippi. The court identified two factors evident from the Florida Supreme Court's case law which demonstrate that although Florida capital juries recommend a sentence to the trial judge, who then imposes sentence, the jury's recommendation is of such significance that Caldwell's concerns are undeniably applicable:

> In light of the case law, we conclude that the Florida jury plays an important role in the Florida capital sentencing scheme. The case law reflects an interpretation of the death penalty statute that requires the trial court to give significant weight to the jury's recommendation, whether it be a recommendation of life imprisonment or a recommendation of death. The case law also reflects, we think, an insightful normative judgment that a jury recommendation of death has an inherently powerful impact on the trial judge.
>
> Because the jury's recommendation is significant in these ways, the concerns

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[8]Mr. Mann's en banc briefs to the Eleventh Circuit presented a detailed analysis of Florida's capital sentencing process and of the Florida Supreme Court's opinions construing that process and the critical nature of the jury's role. In the interests of brevity, that analysis will not be repeated again herein. Mr. Mann's supplemental appendix filed with this brief in opposition includes Mr. Mann's initial and reply en banc Eleventh Circuit briefs (Apps. 1 and 3). With regard to these issues Mr. Mann respectfully refers the Court to that discussion and specifically to pages 1 through 11 of his en banc Eleventh Circuit reply brief (App. 3).

> voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Mann, 844 F.2d at 1454-55.

In coming to its first conclusion -- that the sentencing jury has a significant role in the Florida capital sentencing scheme -- the Eleventh Circuit relied upon four basic principles to which the Florida Supreme Court adheres regarding the administration of the capital sentencing statute. First, the Florida Supreme Court "has severely limited the trial judge's authority to override a jury recommendation of life imprisonment," Mann, 844 F.2d at 1450, steadfastly holding that a trial judge may override a jury's life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person could differ." See Mann, 844 F.2d at 1450-51 (and cases cited therein); see also en banc Eleventh Circuit Initial and Reply Briefs, Mann v. Dugger, Respondent's Supplemental Appendix 1 and 3 (and cases cited therein). The Eleventh Circuit's opinion discussed the various Florida Supreme Court cases, e.g., inter alia, Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); McCampbell v. State, 421 So. 2d 1072, 1075-76 (Fla. 1982); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986), applying this longstanding principle of Florida capital sentencing law. The "Tedder standard" has in fact been recognized by this Court as providing a "significant safeguard" to a capital defendant. Spaziano v. Florida, 468 U.S. 447, 465 (1984).

Second, the Florida Supreme Court also accords a jury's death recommendation great deference, holding that "a jury

recommendation of death is entitled to great weight." See Mann, 844 F.2d at 1451-52 (and cases cited therein); see also Smith v. State, 515 So. 2d 182, 185 (Fla. 1987); en banc Eleventh Circuit Reply Brief of Appellant, App. 3, pp. 5-6 (and cases cited therein). The Florida Supreme Court has consistently applied this principle of Florida capital sentencing law as well. See Smith, supra; Stone v. State, 378 So. 2d 765, 773 (Fla. 1980); LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978).

In fact, as the en banc Eleventh Circuit explained, the Florida Supreme Court has "been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the judge." Mann, 844 F.2d at 1453. Thus, as discussed in the Eleventh Circuit's opinion, the Florida Supreme Court consistently orders resentencing in cases in which sentencing error has occurred before the jury, even if the trial judge has stated that the error did not affect his or her imposition of the death sentence. Mann, 844 F.2d 1453-54 (and cases cited therein). These cases make clear that the Florida Supreme Court "has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error." Id. at 1454.

Third, the Eleventh Circuit pointed out that the Florida Supreme Court's treatment of sentencing error illustrates the importance of the jury recommendation to the sentencing process: in cases in which sentencing error occurs before the jury, the Florida Supreme Court vacates the death sentence and orders resentencing before a new jury. See Mann, 844 F.2d at 1452-53 (and cases cited therein). As the Florida Supreme Court itself has explained:

> This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process. Lamadline v. State, 303 So.2d 17, 20 (Fla.1974)(jury recommendation can be

> "critical factor" in determining whether or not death penalty should be imposed). Under Tedder v. State, 322 So.2d 908, 910 (Fla.1975), a jury's recommendation of life must be given "great weight" by the sentencing judge. A recommendation of life may be overturned only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id.

Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987). Thus,

> [i]f the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

Id. at 659. The Florida Supreme Court's precedents have gone even further than the Eleventh Circuit's Mann opinion in stressing the critical role of the capital sentencing jury in Florida and demonstrating Caldwell's application to the Florida capital sentencing scheme:

> Appellant's eighth point is that the trial court erred in giving the jury's recommendation of death greater weight than that to which it was entitled. In instructing the jury, the trial court stressed that the jury recommendation could not be taken lightly and would not be overruled unless there was no reasonable basis for it. In its sentencing order the judge noted he was imposing the sentence "independent of, but in agreement with" the jury recommendation. There is no error; this is the law. It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and Tedder v. State, 322 So.2d 908 (Fla. 1975).

Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986)(emphasis added).

The Florida Supreme Court has also explained:

> The state . . . suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's

> theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987)(emphasis supplied). Moreoever, the Florida Supreme Court has unequivocally held that the jury's sentencing role is central and "fundamental", Riley, supra, 517 So. 2d at 657-58, while the sentencing judge's role is to serve as "a buffer where the jury allows emotion to override the duty of a deliberate determination" of the defendant's proper sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). Clearly, contrary to the Petitioner's assertions before this Court, the Florida Supreme Court's precedents make clear that Caldwell's concerns apply in Florida. The Petitioner's assertions regarding the role of the jury in Florida's post-Furman capital sentencing scheme would assuredly not be recognized by the Florida Supreme Court. See Ferry, supra, 507 So. 2d at 1376-77.

Finally, the Eleventh Circuit pointed out that the Florida Supreme Court has ordered resentencing when prospective jurors have been excused in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), a case which "assumes . . . that the jury will play a substantive role in the sentencing decision." Mann, 844 F.2d at 1453. This is significant as well, and again demonstrates Caldwell's applicability to the Florida captial sentencing scheme.

Having evaluated all of these factors, the Eleventh Circuit concluded:

> The fact of the matter is . . . that under the existing scheme in Florida the jury does share in capital sentencing responsibility. Because the jury's recommendation is a critical factor in the ultimate sentencing decision, the jury's function, like the function of any capital sentencer, must be

> evaluated pursuant to eighth amendment standards.

Mann, 844 F.2d at 1454 n.10 (emphasis in original).

As the Eleventh Circuit's analysis demonstrates, the State's contention that Caldwell is not applicable to the Florida capital sentencing scheme is belied by the Florida Supreme Court's pronouncements regarding the integral and critical function of the jury in that scheme. Further, the Florida Supreme Court opinions which directly address Caldwell claims also belie the State's assertion that the Florida Supreme Court has categorically rejected Caldwell's application in Florida.

The Florida Supreme Court has not said that providing misleading, inaccurate, and/or false information to a Florida capital jury regarding its role in sentencing is acceptable. On the contrary, in rejecting Caldwell claims, the court has pointed out that the jurors in those cases were provided accurate instructions. The Florida Supreme Court has in fact emphasized that the jury should be informed of the importance of its recommendation. In Mr. Mann's case, as in Caldwell itself and unlike the various challenges to standard jury instructions based upon Caldwell decided by the Florida Supreme Court and cited in the State's petition, the prosecutor presented the sentencing jury with inaccurate, misleading, and false information regarding its sentencing role; the prosecutor's comments were then approved of and uncorrected by the trial judge's instructions. Mr. Mann's case, unlike those cited in the State's petition, falls squarely within Caldwell. As the en banc Eleventh Circuit's opinion makes clear, here as in Caldwell, "the prosecutor's remarks . . . were inaccurate and misleading in a manner that diminished the jury's sense of responsibility," Caldwell, 472 U.S. at 342 (O'Connor, J., concurring), and were then approved by the court. In Mr. Mann's case, the prosecutor's and judge's statements

> misle[d] the jury as to its role in the sentencing process in a way that allow[ed]

> the jury to feel less responsible than it should for the sentencing decision.

Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.15 (1986).

The en banc Eleventh Circuit's opinion also demonstrates that Mr. Mann's case involves far more than a simple challenge to Florida's standard instructions, cf. Combs v. State, 525 So. 2d 853, 861 (Fla. 1988)(Barkett, J., specially concurring)(". . . Mann was based not on some fault inherent in the instructions themselves, but on the prosecutor's misleading remarks, and the judge's failure to correct them."), and is thus far different than those cases involving challenges to standard jury instructions based upon Caldwell which the federal appeals court and the Florida Supreme Court have reviewed. Compare Mann v. Dugger, supra, with Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988)(en banc) (upholding penalty phase standard jury instructions against a challenge based upon Caldwell).[9]

Again, as the Florida Supreme Court itself has stated:

> We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately stressed. . . . Informing a jury of its advisory function does not unreasonably diminish the jury's sense of responsibility. Certainly the reliability of the jury's recommendation is in no way undermined by such non-misleading and accurate information. . . . [T]he jury's role was adequately portrayed

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[9]Caldwell's impact on Florida's death penalty scheme has been far from sweeping. Mr. Mann is in fact only the second Florida capital inmate to have been granted relief pursuant to Caldwell. Clearly, the two cases in which relief has been granted, Mann v. Dugger; Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on rehearing sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), cert. granted, 108 S. Ct. 1106 (1988), involve clear and egregious Caldwell error which is a far cry from a challenge to Florida's standard jury instructions. Mr. Mann's case, more than any other, falls squarely within the rubric of Caldwell: it involves a prosecutor's systematic misleading, inaccurate, and false statements which served to diminish the jury's sense of responsibility for its sentencing task and a trial judge's adoption of those remarks and failure to cure the harm in his instructions.

> and they were in no way misled as to the importance of their role.

Pope v. Wainwright, 496 So. 2d 798, 805 (Fla. 1986). Cf. Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986)("It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell . . . and Tedder").

Most Caldwell claims reviewed by the Florida Supreme Court have focused on Florida's standard jury instructions. That court's rejection of jury instruction based claims is not in conflict with the Eleventh Circuit's en banc standards, Mann, supra; Harich, supra, and is assuredly not in conflict with the specific holding of the en banc Eleventh Circuit in Mann.

C. THE COURT BELOW CORRECTLY DETERMINED THAT MR. MANN'S CALDWELL CLAIM REQUIRED RELIEF

1. The jurors were told by prosecutor and judge that their role in sentencing was not significant

The State's petition presents no coherent argument demonstrating that Caldwell was not violated in Mr. Mann's case. Nor could it, as the prosecutor's misleading, inaccurate, and false statements without doubt served to diminish Mr. Mann's jurors' sense of responsibility for the capital sentencing task which Florida law called on them to perform, and the trial judge's comments and instructions then failed to correct and enhanced the harm (See App. 2 [record excerpts]; see also App. 1 [Eleventh Circuit en banc Initial Brief of Appellant, pp. 3-10, 18-43]). Moreoever, the State's Petition absolutely fails to explain how it is that the prosecutor's "effort[s] had no effect on the sentencing decision . . ." Caldwell, supra, 472 U.S. at 341. Pursuant to Caldwell, the Eleventh Circuit properly granted relief in Mr. Mann's case.

The various misleading, improper, inaccurate, and false prosecutorial comments to Mr. Mann's capital jury were discussed at length in Mr. Mann's initial Eleventh Circuit en banc brief (App. 1; see also, App. 2 [record excerpts]). That detailed discussion will not be repeated again herein. The prosecutor's statements and approving judicial comments and instructions were summarized by the Eleventh Circuit, which "thorough[ly] examin[ed] . . . the trial record," Mann, 844 F.2d at 1455, as follows:

> The first reference to the jury's role was made as the jury was being selected, during counsel's voir dire of the venire. The prosecutor said the following:
>
> > The recommendation that you make to Judge Federico in [the sentencing] portion of the trial is simply a recommendation, and he is not bound by it. He may impose whatever sentence the law permits. He will have been here and will have listened to all the testimony himself.
>
> A few moments later, the prosecutor repeated this point in stronger terms:
>
> > You understand you do not impose the death penalty; that is not on your shoulders.... Again, that decision rests up here with the law, with Judge Federico. You will have the opportunity after you have heard everything there is to hear to make a recommendation to him. But it is not legally on your shoulders, though. It is not your ultimate decision. You act in that regard in an advisory capacity only.
>
> The prosecutor repeated the point again that afternoon, in a dialogue with two veniremen:
>
> > You ... understand that the ultimate responsibility rests with the Court; that it's not the jury's responsibility?
>
> During closing argument at the conclusion of the guilt phase of the trial, the prosecutor once again informed the jury that "[t]he matter of sentencing ultimately rests with [the] Court."
>
> After the jury rendered its verdict of guilty, the jurors were temporarily excused from the courtroom while the court and counsel made preliminary preparations for the sentencing phase of the trial. At that time, defense counsel requested that the jury, when it returned, be instructed by the court that its sentencing recommendation would be

"entitled to great weight." The court refused to grant the request:

> THE COURT: Well, I think that goes without saying. I don't know if I need to instruct them that that is so.
>
> [DEFENSE COUNSEL]: I think it is. The reason we would ask--
>
> THE COURT: That's something that I need to do after they make their recommendation, and I will give it great weight.
>
> [DEFENSE COUNSEL]: I know, but they need to know that so they know we're not up there just--
>
> THE COURT: I think the standard instructions bring home to them that it is very important that they, you know, [d]o not act hastily or without due regard to the gravity of these proceedings, that they should carefully weigh and sift and consider the evidence. I think that's sufficient.

Notwithstanding his apparent understanding of the sentencing jury's function, the judge informed the jurors when they returned to the courtroom that "[t]he final decision as to what punishment shall be imposed rests solely with the judge of this court." The prosecutor repeated the point in the final statement of his closing argument at the conclusion of the sentencing phase:

> What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico. That is his sworn position in the system. He's heard everything you have heard. He may have the opportunity to learn more before he imposes a sentence. I think this community, as represented by this jury, should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required in this case.

The court then read its instructions to the jury. The instructions included the following statements regarding the jury's sentencing function:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed on the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be

> given to you by the Court and render to the Court an advisory opinion based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

The court's instructions also included the following statements:

> The fact that the determination of whether or not a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time, of whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment.

After the court finished reading the instructions, it ordered the jury to retire and make a decision. When the jury returned, it announced a recommendation of death. The jury was polled and then dismissed. After the bailiff had declared that "[t]he jury has left the courtroom," the judge remarked, for the record, that "[t]he court, as required by law, will give great weight to the recommendation of the jury."

Mann, 844 F.2d at 1455-56.

The State Petitioner, of course, can provide no rational explanation demonstrating that statements such as "th[e] decision rests up here with the law, with Judge Federico" (R. 1218); "it is not legally on your shoulders" (R. 1218-19); "you do not impose the death penalty . . . the Court would impose it should you find the Defendant guilty and should he find it necessary and proper in this case" (R. 1363)(emphasis added); "you both understand that the ultimate responsibility rests with the Court; that it's not the jury's responsibility?" (R. 1393); and

> What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico.

> That is his main position in this system.
>
> He's heard everything you have heard.
>
> He may have the opportunity to learn more before he imposes a sentence.
>
> I think this community, as represented by this jury, should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required in this case. Thank you.

(R. 2439)(emphasis added) were anything other than inaccurate, misleading, improper, and false. Neither can the State explain how these comments did not diminish the jurors' sense of responsibility. Neither does the State even attempt to explain how judicial instructions such as

> Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed on the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory opinion.

(R. 2453-54), served to cure the harm caused by the prosecutor's statements rather than approving and compounding the error.

Finally, the State makes no effort whatsoever to explain why the errors herein at issue "had no effect on the sentencing decision . . ." Caldwell, 472 U.S. at 341. The State Petitioner can explain none of this, for Mr. Mann's case falls squarely within Caldwell.

2. The proceedings in Mr. Mann's case violated Caldwell

After examining the record, Judge Tjoflat's opinion for the en banc Eleventh Circuit explained:

> In reviewing Caldwell claims, our task is twofold. First, we must determine whether the prosecutor's comments to the jury were such that they would "minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell, 472 U.S. at 341, 105 S.Ct. at 2646. Second, if the comments would have such effect, we must determine "whether the trial judge in this

case sufficiently corrected the impression left by the prosecutor." McCorquodale v. Kemp, 829 F.2d 1035, 1037 (11th Cir. 1987).

When a trial court does not correct misleading comments as to the jury's sentencing role, the state has violated the defendant's eighth amendment rights because the court has given the state's imprimatur to those comments; the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a correct statement of the law. See Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir.1986)(en banc), cert. denied, --- U.S. ---, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987). When a trial court does make some attempt to correct the prosecutor's misleading comments, the question becomes whether the corrective statement would, in the mind of a reasonable juror who had been exposed to the misleading comments, correct the misapprehension that the comments would induce. Because our focus is ultimately on the trial court's actions, our mode of review is similar to that used to review claims based on erroneous jury instructions. Cf. Lamb v. Jernigan, 683 F.2d 1332, 1339-40 (11th Cir.1982)(court must consider effect of erroneous instruction on reasonable juror "in light of the remainder of the charge and the entire trial"), cert. denied, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983).

In this case, the comments by the prosecutor were such that they would mislead or at least confuse the jury as to the nature of its sentencing responsibility under Florida law. It bears emphasizing that the prosecutor in Caldwell stated only that the jury's verdict would be "automatically reviewable." Technically, this statement was an accurate statement of Mississippi law--death sentences are automatically reviewed by the Supreme Court of Mississippi under Miss.Code Ann Sec. 99-19-105. The mischief was that the statement, unexplained, would have likely been misunderstood by the jurors as meaning that their judgment call on the appropriateness of a death sentence did not really matter. We are faced with a similar situation here. The prosecutor repeatedly told the jury that its task was to render an "advisory" recommendation. As with "automatically reviewable" in Caldwell, this characterization is technically accurate, at least in the sense that the Florida death penalty statute contains the term "advisory." However, the danger exists that the jurors, because they were unaware of the body of law that requires the trial judge to give weight to the jury recommendation, were misinformed as to the importance of their judgment call. The danger is particularly strong here, because nothing in the common meaning of the term "advisory" would suggest to the layman

that the trial judge would in any way be bound by the recommendation; indeed, the common meaning of the term would suggest precisely the contrary.

Moreover, here the prosecutor stated to the jurors twice that the burden of imposing the death penalty was "not on your shoulders." He repeatedly told the jurors that the responsibility for imposing sentence rested with the trial judge. Additionally, we note that the prosecutor suggested to the jurors that the trial judge, because of his position as a legal authority, was more able than the jury to make the appropriate sentencing decision. As the Supreme Court noted in Caldwell, this kind of suggestion induces jurors, who are "placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice," to delegate wrongly their sentencing responsibility. Caldwell, 472 U.S. at 333, 105 S.Ct. at 2641-42. We conclude that the prosecutor's statements, considered together, misrepresent the nature of the jury's critical role under the Florida capital sentencing scheme. Such comments, if uncorrected, would undoubtedly minimize a juror's sense of responsibility, thus creating "a danger of bias in favor of the death penalty." Adams, 804 F.2d at 1532.

Turning to the second prong of our inquiry, we conclude that the trial judge's comments did not correct the false impression left by the prosecutor. The trial court specifically denied defense counsel's request that the jury be properly informed as to its role. Moreover, the judge himself stated that the final sentencing decision rested "solely with the judge of this court." The trial judge expressly put the court's imprimatur on the prosecutor's previous misleading statements by saying to the jurors that "[a]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge."

The only potentially corrective statement by the court came when the court instructed the jurors that they should proceed with "due regard to the gravity" of the matter and should "carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment." This statement, we conclude, did not cure the harm posed by the court's other actions. The statement would do little if anything to change a juror's misapprehension about the effect of the jury's decision; it only instructs the jurors that they should approach their task with care and deliberation. At best, it likely left some jurors confused as to their proper role. We therefore conclude that the court's actions,

> as considered by a reasonable juror who had been exposed to the prosecutor's misleading comments, did not correct the false impression created by those comments. Cf. Caldwell, 472 U.S. at 340 n. 7, 105 S.Ct. at 2645 n. 7 (prosecutor's later statements did not retract or undermine the misimpression created by the earlier statements). Because the overall effect of the court's actions was to diminish the jury's sense of responsibility with regard to its sentencing role, petitioner's sentence is invalid under the eighth amendment.

Mann, 844 F.2d at 1456-58 (emphasis in original)(footnotes omitted).

As is more than plain, the Eleventh Circuit applied the appropriate eighth amendment analysis to Mr. Mann's claim -- the analysis established by this Court in Caldwell. The State Petitioner has failed to show why the Eleventh Circuit was wrong.

CONCLUSION

The en banc Eleventh Circuit's strict holding and ultimate determination in Mr. Mann's case is neither in conflict with this Court's precedents, nor with other federal courts of appeal, nor even with the Florida Supreme Court. The Eleventh Circuit's opinion in Mr. Mann's case procedurally and substantively is in conformity with this Court's well-settled precedents. The two cases now before this Court upon which the Petitioner relies, Dugger v. Adams; Harris v. Reed, are inapposite to Mr. Mann's and will not affect the Eleventh Circuit's ultimate disposition of this action. The Eleventh Circuit's sound en banc opinion should not be disturbed and the petition for writ of certiorari should be denied.

WHEREFORE, Respondent, LARRY EUGENE MANN, respectfully prays that the Court deny Petitioner's Application for a Writ of Certiorari.

Respectfully submitted,

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